Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

No. 85-139

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PENNZOIL OIL COMPANY, *et al.*,
Petitioners,

v.

ASSOCIATED GAS DISTRIBUTORS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ASSOCIATED GAS DISTRIBUTORS

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QUESTIONS PRESENTED

1. Whether a federal court of appeals may enforce its mandate by directing the agency below to vacate a portion of a final order issued for the purpose of complying with the mandate but which failed to do so.

2. Whether a federal court of appeals may treat a motion to enforce its mandate as a petition for review of final agency action.

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BRIEF IN OPPOSITION FOR RESPONDENTS ASSOCIATED GAS DISTRIBUTORS

Associated Gas Distributors (AGD)[1] hereby responds in opposition to the petition of Pennzoil Company, *et al.*

[1] AGD was a petitioner and intervenor in the proceedings below. It is an informal association of some 40 local gas distribution utilities that sell and distribute approximately 25% of the natural gas sold in the interstate market. Its members purchase most of their supplies of natural gas from interstate pipeline companies which, in turn, purchase most of their supplies from producers. The prices paid by interstate pipelines for gas supplies are flowed through to the pipelines' distributor-customers under FERC-approved purchased gas adjustment (PGA) procedures. Pursuant to Sup. Ct. R. 28.1, a list of AGD member companies and their affiliates is attached as Appendix D hereto.

(Petitioners) for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

STATEMENT OF THE CASE

In *Interstate Natural Gas Association v. FERC*, 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1615 (1984) (*"INGAA I"*), the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") held that Federal Energy Regulatory Commission ("FERC" or "Commission") Order Nos. 93 and 93-A, which contained rules for measuring the energy (Btu) content of natural gas, resulted in prices that violated the maximum lawful prices set forth in the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301 *et seq.* (1982). There were, in the D.C. Circuit's words, "inexorable" consequences of its decision in INGAA I: a proper pricing method had to be established for the future and a remedy for the overcharges that had resulted from the use of the improper pricing method had to be established. *Interstate Natural Gas Association of America v. FERC*, 756 F.2d 166 (D.C. Cir. 1985) (*"INGAA II"*) (Petitioners' Appendix at 7a).

The mandate in INGAA I issued on December 8, 1983. On January 19, 1984, FERC issued a Notice of Inquiry ("NOI") inviting comments on the issue of Btu refund procedures. The NOI contemplated a complicated four-phase proceeding, and on February 7, 1984, AGD objected to FERC that this would unnecessarily delay the refunds. On March 29, 1984, having heard nothing from FERC, AGD filed a motion in the D.C. Circuit asking for an order directing FERC to comply with the mandate in *INGAA I*. On April 25, 1984, the D.C. Circuit denied AGD's motion to enforce mandate, stating:

> Petitioner has not established that the agency is in breach of its obligation to direct the payment of refunds as soon as proper and expedited agency proc-

> ess allows. *See generally Federal Power Commission v. Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962); *Public Service Commission of the State of New York v. Federal Power Commission*, 543 F.2d 757 (D.C. Cir. 1974).
>
> Our denial is without prejudice to Petitioner's filing a subsequent motion if clear indication of agency compliance with our mandate, such as publication of a time schedule for a refund procedure, is not forthcoming at an early date.

Unpublished Order, D.C. Circuit No. 81-1690, issued April 25, 1984, attached hereto as Appendix A.

During the Spring of 1984, the Commission accepted comments on the NOI. Several parties raised the issue of offsetting the Btu refunds against amounts claimed by the producers for production-related costs pursuant to NGPA Section 110 and implementing rules issued by the Commission in Order Nos. 94-A *et seq.*[2] On May 3, 1984, the Commission issued an interim rule that did not provide for such offsets. In the ensuing comment period, AGD supported the interim rule and specifically addressed the issue of offsets, pointing out in some detail why they were inappropriate.[3] The Commission, explicitly acting in compliance with the court's mandate, issued the final rule, Order No. 399, on September 20, 1984, requiring the producers to refund the Btu overcharges and forbidding the offset of Btu refunds against the totally unrelated NGPA Section 110 production-related costs.

Upon requests for rehearing, the Commission issued Order No. 399-A on November 20, 1984 (Petitioners'

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[2] The Order No. 94 series of production-related cost orders were then on review in the Fifth Circuit in *Texas Eastern Transmission Corp. v. FERC* (Docket No. 83-4390) (decided August 19, 1985).

[3] See Respondents' Appendix B for a copy of AGD's comments on the offset issue.

Appendix A at 81). In this order "granting in part and denying in part rehearing" of Order No. 399, the Commission adopted a substantial and dramatic modification of the Final Rule set forth in Order No. 399 by permitting the offsets specifically prohibited therein. In so doing, the three Commissioners who supported Order No. 399-A did so "without addressing the weighty rationale behind its [FERC's] earlier Order." *INGAA II*, Petitioners' Appendix at 9a.

On November 21, 1984, AGD filed its second "Motion For Order Directing Compliance with Mandate" ("AGD Motion" or "Motion") in the D.C. Circuit.[4] In its Motion, AGD asked the court to order FERC to comply with its mandate in INGAA I by vacating the offset portion of Order No. 399-A and reinstating that part of Order No. 399 that prohibited offsets.

Meanwhile, on November 20, 1984, one of the producers filed a petition for review of Order Nos. 399 and 399-A in the United States Court of Appeals for the Fifth Circuit.[5] FERC petitioned the Fifth Circuit for permission to defer the filing of the record until the D.C. Circuit had acted on AGD's motion to enforce the *INGAA I* mandate. The Fifth Circuit agreed, deferring the filing until thirty days after the D.C. Circuit ruled on AGD's Motion.

The producers filed an opposition to the AGD Motion in the D.C. Circuit, arguing the merits of the offset issue as well as procedural issues. On March 5, 1985, the court granted AGD's Motion and ordered FERC to vacate the offset portion of Order No. 399-A for the reasons set forth in Order No. 399.

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[4] A copy of this Motion is contained in Respondents' Appendix C attached hereto.

[5] *Mobil Oil Exploration and Producing Southeast, Inc. v. FERC*, No. 84-4775 (5th Cir.). This appeal was transferred to the D.C. Circuit on August 19, 1985.

Various producers filed petitions for rehearing and suggestions for rehearing *en banc* which were denied on May 6, 1985 and May 15, 1985, respectively. The D.C. Circuit, on May 20, 1985, denied the producers' petition for a stay pending the filing with this Court of a petition for a writ of certiorari. The producers then filed an "Application for a Stay of Enforcement of the Judgment of the United States Court of Appeals for the District of Columbia Circuit" with the Chief Justice in his capacity as Circuit Justice for the District of Columbia Circuit. AGD opposed that motion and, on June 3, 1985, the Chief Justice denied the stay. Subsequently, on July 18, 1985, the Commission issued Order No. 399-B[6] in which it vacated the offset portion of Order No. 399-A and reinstated the offset prohibition contained in Order No. 399.

SUMMARY OF REASONS FOR DENYING THE PETITION

The D.C. Circuit's decision in *INGAA I* that Order Nos. 93 and 93-A had permitted producers to charge rates for natural gas that exceeded the maximum lawful prices under the NGPA and its order to FERC to correct that situation are final and binding on all parties. By law, the court's mandate necessarily required the Commission to order refunds and to set in motion procedures for their payment at the earliest possible moment consistent with due process. Because the offset provisions of Order No. 399-A did not comply with the court's mandate in *INGAA I*, AGD moved the court to order the Commission to vacate those provisions and to reinstate the offset prohibition contained in Order No. 399. The court did just that.

A court always has jurisdiction to interpret and enforce its own mandate. The question of what the D.C.

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[6] Various producers filed a petition for stay and for review of Order No. 399-B in the Fifth Circuit. On August 19, 1985, the Fifth Circuit transferred these matters to the D.C. Circuit.

Circuit's mandate included and whether it had been complied with was uniquely the province of that court. The Fifth Circuit, as the only other court in which petitions for review of Order Nos. 399 and 399-A were pending, recognized this by ordering FERC not to file the record there until after the D.C. Circuit decided AGD's motion to enforce the mandate. The court's decision in *INGAA II*, therefore, did not violate principles of comity. Nor did the court's action violate the policy of avoiding piecemeal review (a principle of judicial economy) because agency action was complete and the issues raised in the D.C. and the Fifth Circuits were separate and distinct. Finally, because the Commission does not have untrammeled discretion to decide the manner and timing of refunds and because the D.C. Circuit's action here only served to vacate that portion of the order which offended its mandate, the court did not usurp any discretionary agency function. For all these reasons, the court's actions to enforce its mandate did not constitute a departure from the accepted and usual course of judicial proceedings.

In its *INGAA II* opinion, the D.C. Circuit treated AGD's motion as a petition for review under Section 506 of the NGPA. The question before the court was whether the offset permitted by Order No. 399-A complied with its mandate in *INGAA I*. The Commission had already specifically considered the question of the offset twice before, and the court had before it the results of those deliberations in Order Nos. 399 and 399-A. In addition, the court had been fully briefed on the offset issue, and the analysis it engaged in was exactly the same as if it had treated AGD's motion to enforce mandate only as such. The court specifically found that no party was prejudiced by this procedure, and no due process rights were violated thereby. Accordingly, the D.C. Circuit's action did not constitute a departure from the accepted course of judicial proceedings.

For all these reasons, the petition for a writ of certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS HAD JURISDICTION TO INTERPRET AND ENFORCE ITS MANDATE BY ORDERING THE COMMISSION TO VACATE PROVISIONS OF ORDERS THAT WERE IN CONFLICT WITH IT AND TO REINSTATE PROVISIONS OF ORDERS THAT WERE IN COMPLIANCE

A. The Mandate In *INGAA I* By Law Required The Commission To Make Refunds At The Earliest Possible Moment Consistent With Due Process

In *INGAA I*, the D.C. Circuit found that the Commission's new procedures for measuring the Btu content of natural gas permitted producers to charge more than the maximum lawful prices for that gas established by Title I of the NGPA, 15 U.S.C. §§ 3311-3319 (1982). If no refund were ordered, the Commission would, in effect, be condoning a ceiling price higher than the maximum lawful price in violation of Section 504 of the NGPA, 15 U.S.C. § 3414 (1982) and the Commission's regulations.[7]

At the time the D.C. Circuit issued its mandate in *INGAA I*, the principle had been well established by this Court that when refunds are required, they must

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[7] Section 270.101(e) of the FERC's regulations implementing the NGPA provides that:

> Any price collected with respect to a first sale of natural gas . . . is collected subject to a general obligation promptly to refund any portion of such price, together with interest . . . which is in excess of the maximum lawful price.

18 C.F.R. § 270.101(e) (1985). There are only a few limited circumstances, not applicable here, in which the maximum lawful price may be exceeded. An explanation of those circumstances is contained in footnote 11 to Order No. 399. *See* Petitioners' Appendix at 22a.

be made "at the earliest possible moment consistent with due process." *FPC v. Tennessee Gas Transmission Company*, 371 U.S. 145, 155 (1962); *see also United Gas Improvement Company v. Callery Properties*, 382 U.S. 223, 230, *reh'g denied*, 382 U.S. 1001 (1965). Any other result would violate the purpose of both the Natural Gas Act (NGA),[8] and the NGPA which is

> [T]o afford the consumer a complete, permanent and effective bond of protection from excessive rates and charges.

Atlantic Refining Company v. Public Service Commission of New York, 360 U.S. 378, 388 (1959).[9] As this court pointed out in *FPC v. Tennessee Gas Transmission Company*, *supra*, 371 U.S. at 154-155, the mere promise of refunds in the future does not satisfy this requirement because

> [E]xperience has shown this to be somewhat illusory in view of the trickling down process necessary to be followed, the incidental cost of which is often borne by the consumer, and in view of the transient nature of our society which often prevents refunds from reaching those to whom they are due . . .

The longer the delay in making the refunds, the greater the chance that the consumers who will ultimately benefit from them will not be the ones who paid the overcharges. Thus, for these three reasons—(1) the Commission had no authority to permit producers to retain amounts exceeding the NGPA ceiling prices; (2) the Commission's regulations required refunds of amounts collected in excess of the maximum lawful price; and (3) well established law required that refunds be made at the earliest possible moment consistent with due

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[8] 15 U.S.C. § 717 *et seq.* (1982).

[9] *See also, Sunray Mid-Continent Oil Company v. FPC*, 364 U.S. 132, 147 (1960); *Public Service Commission of the State of New York v. FPC*, 543 F.2d 757 (D.C. Cir. 1974).

process—the mandate of the D.C. Circuit in *INGAA I* necessarily and implicitly included a requirement that the Commission order refunds at the earliest possible moment consistent with due process.

B. The Court Of Appeals Properly Considered Whether The Offset Provision Complied With Its Mandate

When AGD filed its motion to enforce the *INGAA I* mandate, it raised only a single issue—whether the offset provision of Order No. 399-A met the mandate of *INGAA I*. A court has inherent power to construe and enforce its mandate. *United States v. New York Telephone Company*, 434 U.S. 159, 172 (1970).[10] Once a court has construed its mandate, it has the power to issue such orders as are necessary to "effectuate and prevent the frustration of orders it has previously issued." *United States v. New York Telephone Company*, *supra*, 434 U.S. at 172.[11] These principles, ordinarily

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[10] *See also, Regal Knitwear Company v. NLRB*, 324 U.S. 9, 15 (1974); *New Jersey v. New York City*, 296 U.S. 259, 261 (1935); *In re Sanford Fork and Tool Company*, 160 U.S. 247, 255-256 (1895); *see also, Potomac Electric Power Company v. ICC*, 702 F.2d 1026, 1032 (D.C. Cir. 1983); *American Trucking Associations, Inc. v. ICC*, 669 F.2d 957, 960 (5th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983); *City of Cleveland, Ohio v. FPC*, 561 F.2d 344, 346 (D.C. Cir. 1977); *Southern Natural Gas Co. v. FPC*, 543 F.2d 530, 532 (5th Cir. 1976); *Floersheim v. Engmen*, 494 F.2d 949, 954 (D.C. Cir. 1973); *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 278 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

[11] *See also, In re Sanford Fork and Tool Company, supra*, 160 U.S. at 255; *Baltimore and Ohio Railroad Co. v. United States*, 279 U.S. 781, 785 (1929); *Potomac Electric Power Company v. ICC, supra*, 702 F.2d at 1032; *American Trucking Associations, Inc. v. ICC, supra*, 669 F.2d at 960 (and cases cited therein); *Oswald* v. *McGarr*, 620 F.2d 1190, 1195-96 (7th Cir. 1980); *City of Cleveland, Ohio v. FPC, supra*, 561 F.2d at 346; *Yablonski v. United Mine Workers of America*, 454 F.2d 1036, 1038 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).

applied to a superior court's enforcing of its mandate *vis a vis* a lower court, are equally applicable to judicial review of administrative agency action undertaken pursuant to court order. *City of Cleveland, Ohio v. FPC*, 561 F.2d 344, 346-47 (D.C. Cir. 1977) ("these principles, so familiar in operation within the hierarchy of judicial benches indulge no exception for reviews of administrative agencies").[12]

Here, the D.C. Circuit in *INGAA II* clearly recognized that AGD had asked it only to decide whether the offset portion of Order No. 399-A complied with its mandate in *INGAA I* and, if not, to vacate that portion of the order. That is all the court did.[13] (Petitioners' Appendix at 7a). First, it determined what the law required and explained that its mandate necessarily included compliance with those requirements:

> The law requires the ordering of refunds at the earliest possible moment.
>
> * * * *
>
> Two consequences of our decision are inexorable: implement the proper pricing method for future pricing decisions and remedy the effects of past use of the improper pricing method at the earliest possible moment.

Petitioners' Appendix at 12a, 17a. The court analyzed Order No. 399's prohibition of offsets and concluded that it complied with the court's mandate for the reasons

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[12] *See also, Regal Knitwear Company v. NLRB, supra*, 324 U.S. at 15; *American Trucking Associations, Inc. v. ICC, supra*, 669 F.2d at 960; *Floersheim v. Engmen, supra*, 494 F.2d at 953.

[13] Petitioners incorrectly state that AGD urged the court of appeals to exercise its extraordinary power under the All Writs Act, 28 U.S.C. § 1651 (1982), to issue a writ of mandamus (Petition at 5). AGD did not invoke the All Writs Act in its motion (see Appendix C), nor did the court do so in its decision and order in INGAA II.

which the Commission itself had stated in Order No. 399.[14]

The court analyzed the offset provisions of Order No. 399-A and determined that they did not meet the terms of the mandate. It found that the Commission's failure to explain why it so radically changed its mind constituted arbitrary and capricious action and violated the requirements of refunds at the earliest possible moment:

> The offset scheme embodied in Order No. 399-A will only further delay refund of the overcharges, circumventing our mandate in *Interstate* and the clear instruction of the Supreme Court in *Tennessee Gas.*

Petitioners' Appendix at 11a-12a. Having thus interpreted its mandate and found Order No. 399-A not to comply, the court granted the relief sought by AGD by issuing an order directing compliance with the mandate. In its order, filed March 5, 1985, the court explicitly stated:

> Upon consideration of the Motion of Petitioner Associated Gas Distributors to enforce this Court's mandate in the captioned cases and of the various responses thereto, and of petitioner's reply, and this Court having reviewed the record and the pleadings herein and having heard oral argument on the motion, it is

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[14] "FERC's prohibition of offsets was well considered. The controversy over production-related costs to be recouped by producers under Section 110 constitutes unsettled litigation wholly separate from the instant case. As such, permitting producers to offset their refund obligations would bring delay and confusion into an already complex area. Moreover, the principles of law and the customers involved in the refund arrangement are far from identical to those implicated in the Section 110 cost proceedings. By prohibiting offsets, FERC designed the system most likely to insure that customers will receive refunds due them. Involving disparate issues on a matter on appeal to another court may complicate, delay, and obfuscate the refunds at issue here." Petitioners' Appendix at 12a.

> ORDERED, by the Court, that the *motion by Associated Gas Distributors to direct compliance with the Court's mandate is herein granted* and that the Federal Energy Regulatory Commission is directed to vacate the offset portion of its Order No. 399-A, for the reasons set forth in its own order No. 399, in accordance with the Opinion for the Court filed herein this date.

Petitioners' Appendix at 131a, emphasis added.

There is no question that the court had the authority to do exactly what it did—to interpret its mandate and to enforce it. Its actions did not in any way depart from the accepted and usual course of judicial proceedings.

C. The Court Of Appeals' Action Was Appropriate Because The Commission Did Not Have Discretion To Establish Refund Provisions In Violation Of Applicable Law

Petitioners assert that mandamus could not lie because "the manner and timing of refunds" is purely discretionary. (Petition at 21-23). That principle is inapplicable to the facts of this case because the Commission does not have untrammelled discretion as to the manner and timing of refunds. First, refunds where the NGPA maximum lawful price is exceeded are *not* discretionary; they are mandatory.[15] Moreover, the Commission is limited by the concept of abuse of discretion and by the need to comply with other legal requirements affecting the manner and timing of refunds. The Commission's discretion, therefore, was limited by the legal requirement that refunds be made at the earliest possible moment consistent with due process. The court specifically determined that this legal requirement could not be met if offsets

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[15] See Section 504 of the NGPA, 15 U.S.C. § 3414 (1982) and implementing regulations at 18 C.F.R. § 270.101(e) (1985). See *supra* at p. 7 and n.7.

were permitted. It therefore found that the offset provision of Order No. 399-A constituted an abuse of discretion.

The Commission's "discretion" with respect to the manner of making refunds is also limited by the requirement that it give "due weight to considerations of equity" *Gillring Oil Company v. FERC*, 566 F.2d 1323, 1325-26 (5th Cir.), *cert. denied*, 439 U.S. 823 (1978) and that it engage in "broad" penetrating analysis of all the equitable considerations. *Public Service Commission of the State of New York v. FPC*, 329 F.2d 242 (D.C. Cir.), *cert. denied sub nom. Prado Oil and Gas Company v.* FERC, 377 U.S. 963 (1964). In that case, the court overturned a postponement of refunds because it found that the interests of consumers in prompt refunds outweighed the equitable considerations of the producers. The agency is also required to look at the "backdrop of practical consequences resulting from its refund order. *FPC v. Tennessee Gas Transmission Company*, 371 U.S. 145, 155 (1962). What is more, the Commission must engage in reasoned decision making in arriving at its decisions. *Tenneco Oil Company v. FERC*, 571 F.2d 834 (5th Cir.), *cert. denied*, 439 U.S. 801 (1978).[16] Applying these principles, the D.C. Circuit has, in the past, specifically rejected an offset where it determined that the offset dealt with unrelated debts. *Cities Service Gas Company v. FPC*, 535 F.2d 1278 (D.C. Cir. 1976).

Here, the court determined that the reasoning in Order No. 399 satisfied the requirements for proper exercise of discretion with respect to the manner and timing of refunds. The decision in Order No. 399 to forbid offsets was an exercise of the Commission's limited discretion to decide the manner and timing of refunds—limited by the

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[16] *See also, Estate of L.D. French v. FERC*, 603 F.2d 1158, 1162-63 (5th Cir. 1979); *Texas Eastern Transmission Corporation v. FPC*, 414 F.2d 344, 347 (5th Cir. 1969) *cert. denied*, 398 U.S. 928 (1970); *Public Service Commission of the State of New York v. FPC*, 543 F.2d 757, 826 (D.C. Cir. 1974).

requirements of the mandate, the purpose and provisions of the law, and considerations of equity. Further, the court determined that the need to make refunds at the earliest possible moment was required by law and that the offset portion of Order No. 399-A did not meet that requirement. It also determined that the lack of reasoned decision making in Order No. 399-A constituted an abuse of discretion. For all these reasons, the court's decision to vacate the offset provision of Order No. 399-A was proper.

II. THE COURT'S DECISION TO TREAT AGD'S MOTION FOR AN ORDER DIRECTING COMPLIANCE WITH MANDATE AS A PETITION FOR REVIEW WAS PROPER

The court had well established precedent for its decision to treat AGD's Motion as a petition for review. *See INGAA II*, Petitioners' Appendix at 9a-11a. The cases cited by the court, as well as others cited below at 19-21, stand for the proposition that a motion to enforce mandate may be treated as an appeal provided that principles of finality and due process are not violated. Here, the court determined that either pleading could have been filed at that time,[17] the spirit of the notice requirements was fully met,[18] the relief sought was identical,[19] and the analysis required would be the same.[20] *See* Petitioners' Appendix at 10a-11a. It also found that, because the single issue before it had been briefed and argued, no one would be prejudiced by treating the matter as a petition for review. Under these circumstances, the court's determination to treat AGD's motion as a petition for re-

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[17] *U.S. v. Green*, 499 F.2d 538, 540, n.5 (D.C. Cir. 1974).

[18] *Rabin v. Cohen*, 570 F.2d 864, 866-67 (9th Cir. 1978); *see also*, 16 Wright & Miller, Federal Practice and Procedure § 3949 (1977).

[19] *Chase v. Robson*, 435 F.2d 1059, 1060, 1062 (7th Cir. 1970).

[20] *United States v. RMI Company*, 599 F.2d 1183, 1187-90 (3rd Cir. 1979).

view was not an abuse of discretion or a violation of law.[21]

In addition to arguing a lack of valid precedent, petitioners argue that the court lacked jurisdiction to reach the merits of the offset issue for three additional reasons: (1) exhaustion of administrative remedies—the requirement for seeking agency rehearing as required by Section 506 of the NGPA (15 U.S.C. § 3416); (2) venue —the allegation that the Fifth Circuit had exclusive jurisdiction and that the case should have been transferred there pursuant to 28 U.S.C. § 2112; and (3) the alleged invalidity of the court's action for a variety of due process complaints. Petitioners' arguments on each of these issues should be rejected for the following reasons.

A. The Purpose And Policy Of The NGPA Rehearing Requirement Was Fully Satisfied

The essence of the petitioners' argument is that the court lacked jurisdiction to reach the merits of the offset portion of Order No. 399-A because AGD's December 6, 1984 petition for rehearing had not been decided by FERC.[22] This argument is without merit because the purpose of the NGPA rehearing requirement had already been satisfied with the issuance of Order No. 399-A.

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[21] Petitioners, in their desire to discredit the court's action, totally mischaracterize one of the authorities cited by the court. See Petition at 20, n.29. In *National Organization for the Reform of Marijuana Laws v. Ingersoll*, 497 F.2d 654, 656, n.3 (D.C. Cir. 1974), the D.C. Circuit specifically treated a petition for mandamus as a petition for review. The hearing ordered in that case was not a prerequisite to appellate review. Rather, it was the relief sought by the petitioners because the agency had denied them a hearing on the merits.

[22] AGD had filed a protective request for rehearing of Order No. 399-A with FERC on December 6, 1984. It had also filed a protective Petition for Review in the D.C. Circuit on January 18, 1985. The Commission granted rehearing in Order No. 399-B issued July 18, 1985, in which the Commission vacated the offset provision of Order No. 399-A.

The rehearing requirement of 15 U.S.C. §§ 3416(a)(2) and (4) that a party seeking judicial review first seek rehearing before the Commission is concerned not with the formality of applying for rehearing but with the rationale that the agency has particular and specialized expertise that it ought to be allowed to exercise in correcting any errors it may have made before the court reviews agency proceedings. *Tenneco Exploration Ltd. v. FERC*, 649 F.2d 376, 378-79, n.1 (5th Cir. 1981). In addition, the rehearing requirement is intended to give the court the benefit of the agency's consideration of issues which involve technical questions of expertise.[23] The requirement for a rehearing as well as the companion principle that issues not raised before an administrative body may not ordinarily be raised before a reviewing court, are based on the principle of exhaustion of administrative remedies which is a prudential, not a jurisdictional, doctrine. In other words, while the statute may, under ordinary circumstances, require rehearing, that requirement is not absolute. As this Court pointed out long ago in *Hormel v. Helvering*, 312 U.S. 552, 557 (1941), "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them." So, for example, in *Arkansas Power and Light Co. v. FPC*, 517 F.2d 1223, 1236-37 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976), the court stated:

> [T]he exhaustion of remedies doctrine which is expressed in the statute[24] is not inflexible; it allows

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[23] *See, e.g., FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492, 500-501 (1955); *Whitney National Bank In Jefferson Parish v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965); *ECEE, Inc. v. FERC*, 611 F.2d 554, 556 (5th Cir. 1980); *Public Service Commission of the State of New York v. FPC*, 543 F.2d 757, n.116 (D.C. Cir. 1974); *Hennesey v. SEC*, 285 F.2d 511, 515 (3rd Cir. 1961).

[24] Section 19(b) of the NGA, 15 U.S.C. § 717(r), which is, in all material respects, identical to Section 506 of the NGPA.

> for deviation where the interests of justice dictate [citations omitted].

If seeking rehearing would be futile in light of prior agency action, the court may waive the requirement.[25] As the court stated in *Public Service Commission of the State of New York v. FPC, supra*, 543 F.2d at 775, n.116:

> [M]odification of a prior administrative decision on rehearing does not generate a need to request *another* rehearing where the litigant has already presented his point to the Commission for decision. (Emphasis added.)

See also, 4 K. Davis, Administrative Law Treatise (2d ed.) §§ 26.7 and 26.11 (1983).[26]

Here, the purpose of the rehearing requirement had been more than adequately met. The Commission, in the NOI, had invited all interested parties to comment on the refund procedure. Those comments included discus-

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[25] *See, e.g., U.S. Alkali Export Association, Inc. v. United States*, 325 U.S. 196, 210 (1945); *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587 (1926); *Hudson v. Farmers Home Administration*, 654 F.2d 334, 337 (5th Cir. 1981). *See also Porter County Chapter of the Izaak Walton League of America, Inc. v. Costle*, 571 F.2d 359, 364 (7th Cir.), *cert. denied*, 439 U.S. 834 (1978) (prior agency action).

[26] A good illustration of this principle is found in *Department of Fish and Game of the State of California v. FPC*, 359 F.2d 165, 169 (9th Cir.), *cert. denied*, 385 U.S. 932 (1966). There, petitioner sought mandamus to enforce the court's mandate *without* seeking rehearing of the latest in a series of orders. The court stated that since the rehearing requirement of Section 313 of the Federal Power Act, 16 U.S.C. § 825*l* had not been met, it could refuse to consider the appeal, but the facts were such that the petitioner had reasonably concluded that filing a petition for rehearing would be "meaningless". The court, therefore, proceeded to decide the issue on the merits. Petitioners cite this case on page 15 of their Petition for the proposition that, even when seeking mandamus, rehearing must first be sought and ruled upon. As the discussion here demonstrates, petitioners have completely missed the point of this case and its holding.

sion of the offset issue. In its comments on the interim rule, AGD discussed in detail reasons why an offset would be inequitable and inappropriate. See Respondents' Appendix B. AGD having raised its concerns before the Commission in this forum, "FERC was adequately apprised of the petitioner's contentions" and the purpose of the rehearing requirement as to the offset issue was amply met. *Tenneco Exploration Ltd. v. FERC*, *supra*, 649 F.2d at 378-79, n.1.

The Commission cited many of AGD's reasons as justification for its denial of offsets in the final rule, Order No. 399. Having carefully considered the offset issue there, the Commission considered it again in response to the producers' requests for rehearing. Order No. 399-A was the result of that reconsideration. It can thus hardly be claimed that the agency did not have ample opportunity to bring its expertise to bear on the offset issue. Having reached one conclusion and then, upon reflection, having reversed itself, it was not likely that the Commission would change its position yet a third time. Seeking rehearing would therefore have been futile.

Both because the purpose of the rehearing requirement was amply met and because it would have been futile to seek rehearing, the action of the D.C. Circuit in not requiring agency action on a petition for rehearing before considering AGD's Motion as a petition for review was well within the accepted and usual course of judicial proceedings.

B. Venue Was Proper In The Court Of Appeals

Petitioners' argument that the court lacked venue is wrong for three reasons. *First*, such a conclusion is belied by the very language of the judicial review provision that they invoke in their aid. Section 506(a)(4) of the NGPA provides in pertinent part:

> Upon the filing of such *petition* such court shall have jurisdiction, which *upon the filing of the record with*

> *it shall be exclusive*, to affirm, modify, or set aside such order in whole or in part (emphasis added).

AGD filed its protective petition for review in the D.C. Circuit on January 18, 1985, before the record had been filed in the Fifth Circuit and before the court acted in *INGAA II*. The lack of a filed record, therefore, meant that neither the Fifth Circuit nor the D.C. Circuit had *exclusive* jurisdiction. Both circuits had appropriate venue.

Petitioners' second argument—that 28 U.S.C. § 2112 (1982) required transfer to the Fifth Circuit—is also without merit.[27] Section 2112(a) is simply a rule of comity designed to prevent unseemly conflict among the circuits. All that was pending before the D.C. Circuit was a determination of what was contained in the *INGAA I* mandate and whether the offset provisions of Order No. 399-A complied with it. Comity would have been violated if the Fifth Circuit *had* attempted to decide what the D.C. Circuit's mandate meant. The Fifth Circuit's decision to delay the filing of the record was an implicit recognition of this fact and a determination on its part not to seek exclusive jurisdiction of the issues until the D.C. Circuit had decided, as only it could, whether Order No. 399-A violated its mandate in *INGAA I*.

Petitioners' Section 2112 argument must also fail because the venue provisions of 28 U.S.C. § 2112 are subject to an exception which specifically encompasses the facts of this case. Even if one accepts petitioners' assertions that their petitions for review in the Fifth Circuit constituted the first filed appeals, a subsequently filed appeal need not be transferred to the court of first filing

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[27] In light of the Fifth Circuit's recent transfer of Petitioners' pending petitions for review of Order Nos. 399, 399-A, and 399-B to the D.C. Circuit, petitioners' transfer and venue arguments are moot.

> [W]here the same or inter-related proceeding was previously under review in the Court of Appeals, and is now brought for review of an order entered after remand, or in a follow-on phase, where continuance of the same appellate tribunal is necessary 'to maintain continuity in the total proceeding.'

Public Service Commission for the State of New York v. Federal Power Commission, 472 F.2d 1270, 1272 (D.C. Cir. 1972) citing *Pacic Gas and Electric Company v. Federal Power Commission*, 272 F.2d 510, 511 (D.C. Cir. 1958). Sequential regulations that arise from the same or irreleated proceedings are normally considered the same order for purposes of 28 U.S.C. § 2112(a).[28]

Here, all the Btu measurement and refund issues dealt with in Orders No. 93, 93A, 399, and 399-A had been decided by the D.C. Circuit. The only question before the D.C. Circuit in *INGAA II* was whether its mandate in *INGAA I* had been properly carried out. That court was the only one competent to make that determination. It was, therefore, perfectly proper for the D.C. Circuit not to transfer this action to the Fifth Circuit.

Petitioners' argument that 28 U.S.C. § 2112 was violated because the D.C. Circuit's action resulted in piecemeal review is also without merit. The concept of piecemeal review ordinarily applies to judicial review before agency action is complete. *See, e.g., Cities of Anaheim and Riverside, California v. FERC*, 692 F.2d 773 (D.C.

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[28] *See, e.g., BASF Wyandotte Corp. v. Costle*, 582 F.2d 108, 112 (1st Cir. 1978); *Public Service Commission for the State of New York v. FPC, supra*, 472 F.2d at 1272; *Westinghouse Electric Corp. v. United States Nuclear Regulatory Commission*, 598 F.2d 759, 766-67 (3rd Cir. 1979); *Eastern Airlines, Inc. v. CAB*, 354 F.2d 507, 510-11 (D.C. Cir. 1965). *See also, ITT World Communications, Inc. v. FCC*, 621 F.2d 1201, 1208-09 (2nd Cir. 1980); *American Public Gas Association v. FPC*, 555 F.2d 852, 857 (D.C. Cir. 1976); *Farah Manufacturing Co., Inc. v. NLRB*, 481 F.2d 1143, 1145 (8th Cir. 1973).

Cir. 1982); *Pennzoil Co. v. FERC*, 742 F.2d 242 (5th Cir. 1984). The danger sought to be avoided is the waste of judicial and administrative time and resources that may result from judicial intervention before the agency has had an opportunity to act fully and finally. Here, the Commission's action was clearly final. The issues raised in the Fifth and the D.C. Circuits were separate and distinct. There was, therefore, no opportunity for the dangers associated with piecemeal review to arise. What is more, as demonstrated above, if transfer were needed to prevent piecemeal review, the Fifth Circuit could legitimately have been obliged to transfer petitioners' appeals to the D.C. Circuit "in the interest of justice." 28 U.S.C. § 2112(a) (1982). The Fifth Circuit's recent transfer of all the Btu refund proceedings to the D.C. Circuit fully supports this view. For all these reasons, the purpose of 28 U.S.C. § 2112 was fully satisfied.

Finally, even if venue had been initially proper only in the Fifth Circuit, that court had inherent jurisdiction, independent of 28 U.S.C. § 2112, to transfer any case to any other circuit in which jurisdiction and venue *could* be proper "in the interests of justice and sound judicial administration." *Eastern Airlines, Inc. v. CAB*, *supra*, 354 F.2d at 510-511.[29] The Fifth Circuit's decision to forego exclusive jurisdiction by delaying the filing of the record in order to allow the D.C. Circuit to explain what its mandate meant and to decide whether it had been violated was apparently the first step in making such a determination. It has now completed the process by transferring all outstanding Btu refund appeals to the D.C. Circuit. Accordingly, neither its actions nor

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[29] *See also, Pearce v. Director, Office of Workers' Compensation Programs*, 647 F.2d 716, 720, n.3 (7th Cir. 1981); *Dayton Power & Light Co. v. EPA*, 520 F.2d 703 (6th Cir. 1975); *Natural Resources Defense Council v. EPA*, 465 F.2d 492, 495-96 (1st Cir. 1972); *Panhandle Eastern Pipe Line Co. v. FPC*, 343 F.2d 905, 909 (8th Cir. 1965).

that of the D.C. Circuit were improper or an abuse of discretion.

For all these reasons, the court's decision to treat AGD's Motion as a petition for review of the offset issue, and the Fifth Circuit's acquiescence and cooperation in that determination, did not constitute a violation of either the letter or the spirit of 28 U.S.C. § 2112.

C. The Court's Decision To Treat AGD's Motion As A Petition For Review Did Not Violate Producers' Due Process Rights

Petitioners argue that the court's action in deciding whether its mandate had been complied with has resulted in piecemeal review that has somehow denied them the opportunity to be heard at a meaningful time and in a meaningful manner (Petition at 19). This contention is without merit. As petitioners admit, the "meaningful time and place" argument applies only when a party is to be deprived of significant property rights. *See* cases cited at Petition, p. 19.

Here, Petitioners have not been deprived of any property rights. The court's order did absolutely nothing to the amounts owed by petitioners;[30] it merely affected the timing of payments. Not surprisingly, petitioners have cited no authority for their claim that the timing of payments they owe someone else rises to the level of a property right. Petitioners have therefore misapplied the due process doctrine.

Petitioners' argument that they were denied due process because the court did not have the full administrative record before it is similarly without merit. The court's determination that the offset portion of Order

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[30] Petitioners' claim that if they could argue everything in one jurisdiction they would somehow save "additional refunds" of $450 million is, to put it in its best light, disengenuous. *All* that is involved here is the timing and manner of refunds, *not* the amounts.

No. 399-A did not comply with its mandate was based on its determination that while Order No. 399 was the product of reasoned decision-making, Order No. 399-A was not. That is a determination made from the *face* of the order under review, *i.e.*, from an evaluation of the reasoning engaged in, and the support actually claimed for, the results reached.[31] If the decision of the agency does not clearly articulate a "rational connection between the facts found and the choice made," the decision is arbitrary and capricious and may not stand. *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1499 (D.C. Cir.), *cert. denied sub nom. Texas Eastern Transmission Corp. v. Farmers Union Central Exchange, Inc.*, —— U.S. ——, 105 S.Ct. 507 (1984), quoting *Burlington Trunk Lines v. United States*, 371 U.S. 156, 168 (1962). *See also, American Public Gas Association v. FPC*, 567 F.2d 1016, 1029-30 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978). The record relevant to such a determination, therefore, is the order itself. Here, it was the comparison of Order Nos. 399 and 399-A that revealed the fatal flaw. The D.C. Circuit, therefore, had all the record it needed to reach the decision it reached.

CONCLUSION

Petitioners conclude that *INGAA II* stands for the proposition that parties dissatisfied with administrative agency action no longer need standing, no longer need to request rehearing, no longer need to file a petition for review and no longer need a record on appeal before

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[31] *See, e.g., Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, —— U.S. ——, 103 S.Ct. 2856, 2866, 2869-71 (1983); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962); *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1500, 1511 (D.C. Cir.), *cert. denied sub nom. Texas Eastern Transmission Corp. v. Farmers Union Central Exchange, Inc.*, —— U.S. ——, 105 S.Ct. 507 (1984).

seeking judicial review. (Petition at 9) They also conclude that *INGAA II* has such broad applicability that "it will fundamentally change the relationships among federal agencies and reviewing courts, among the various courts of appeals, and among parties before agencies" and, as a result, will have a "broad, deleterious effect on judicial review of administrative decisions generally." (Petition at 9-10).

Such hyperbole and exaggerated rhetoric do not advance the cause of meaningful judicial review in this Court. *INGAA II* does not stand for any of these propositions. It stands plainly and simply for the propositions that a court always has jurisdiction to interpret and enforce its own mandate and that the particular facts of the situation will control the extent to which procedural formalities may be modified in the interests of sound judicial administration and equity.

Here, the Commission had fully considered the single substantive issue—the propriety of offsets—on two previous occasions. The sole question before the court of appeals was whether the offsets provided for in Order No. 399-A complied with the *INGAA I* mandate. Both the D.C. Circuit and the Fifth Circuit determined that the review of that question would be better accomplished in the D.C. Circuit. Full and complete review of that issue was had in the D.C. Circuit. It was completely irrelevant whether the court called its deliberations a review upon motion to enforce mandate or a review on the merits upon petition for review. The results reached were fully supportable in either case and comported with all appropriate considerations of judicial comity, exhaustion of administrative remedies, standards of sound judicial administration, and the applicable laws—*i.e.*, the NGA, the NGPA, and 28 U.S.C. § 2112—all as construed by the courts. The D.C. Circuit's actions, therefore, were not in any way a departure from the accepted and usual course of judicial proceedings.

AGD, therefore, respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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August 26, 1985

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

No. 81-1690

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner

MOBIL OIL CORPORATION, *et al.*,
Intervenors

And Consolidated Cases

[Filed Apr. 25, 1984]

Before: ROBINSON, *Chief Judge*; MIKVA and SCALIA, *Circuit Judges*

ORDER

Petitioner's motion for an order directing compliance with our mandate in the above captioned case is *DENIED*.

Petitioner has not established that the agency is in breach of its obligation to direct the payment of refunds as soon as proper and expedited agency process allows. *See generally Federal Power Commission v. Tennessee*

Gas Transmission Co., 371 U.S. 145 (1962); *Public Service Commission of the State of New York v. Federal Power Commission*, 543 F.2d 757 (D.C. Cir. 1974).

Our denial is without prejudice to Petitioner's filing a subsequent motion if clear indication of agency compliance with our mandate, such as publication of a time schedule for a refund procedure, is not forthcoming at an early date.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RM84-6-000

REFUNDS RESULTING FROM BTU
MEASUREMENT ADJUSTMENTS

COMMENTS OF ASSOCIATED GAS DISTRIBUTORS ON THE INTERIM RULE

Associated Gas Distributors (AGD) submits the following comments on the Commission's Interim Rule issued May 3, 1984. AGD appeared at the May 24, 1984 public hearing and participated in one of the panel discussions conducted by the Commission at the hearing. The purpose of these comments is to address several issues raised by the participants at the public hearing, particularly the proposal of the Indicated Producers and Tennessee Gas Pipeline (Tennessee) that refunds resulting from Order No. 93 be offset by amounts which the producers have billed the pipelines for production-related activities as defined in Order No. 94-A and the related orders implementing Section 110 of the Natural Gas Policy Act of 1978 (NGPA). For the reasons stated below, AGD urges the Commission to reject this offset proposal.

First, however, AGD wishes to state, as it did at the public hearing, that it strongly supports the Commission's Interim Rule and urges the Commission to adopt it without modification as the final rule for Btu refunds. The Interim Rule presents a balanced answer to the three critical points on which the Commission sought comment in its January 19, 1984 Notice of Inquiry: the timing, method, and monitoring of Btu refunds. The refund pro-

cedures established in the Interim Rule are far more expeditious than the four-step procedure contemplated in the Commission's initial Notice of Inquiry. The periods within which large and small producers are required to make refunds to their customers provide adequate protection to the producers and at the same time satisfy the Commission's duty to direct payment of refunds at the earliest possible moment consistent with due process.[1] The Interim Rule requirement that pipelines make cash refunds to their customers strikes a balance between considerations of the administrative simplicity of making refunds via the PGA mechanism on the one hand, and the more important considerations of refunding overcharges to those who actually paid them, avoiding disruption of inter-pipeline market competition, and efficient monitoring of the refund process at both the federal and state level, all of which clearly favor the lump-sum cash payment procedure ordered by the Commission. The Interim Rule, in short, presents a reasonably prompt and fair basis for compliance with the Court's mandate in this matter and should be adopted substantially in its present form as the Commission's final rule.

The Proposal to Offset Order 93 Refunds Should be Rejected

At the May 24, 1984 public hearing, both the Indicated Producers and Tennessee proposed modifications to the Interim Rule to permit a producer or a pipeline to offset Btu measurement refunds owed to their customers with amounts billed by the producers for production-related activities. The Indicated Producers request that

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[1] *See United Gas Improvement Company v. Callery Properties,* 382 U.S. 223, 230 (1965), *quoting Federal Power Commission v. Tennessee Gas Transmission Co.,* 371 U.S. 145, 155 (1962); *see also Public Service Commission of the State of New York v. Federal Power Commission,* 543 F.2d 757 (D.C. Cir. 1974); *Atlantic Refining Co. v. Public Service Commission of the State of New York,* 360 U.S. 378, 388 (1959).

the Commission modify the Interim Rule to permit the producer the right to offset any Btu refunds with production-related charges billed by the producer to its pipeline customers. Tennessee requests a modification of the Interim Rule to permit interstate pipelines to flow through Btu refunds by credit to Account 191 and to offset the refund amounts due to their customers with production-related charges invoiced by the producers.

The Interim Rule permits the producers to make refunds to their pipeline customers by means of billing adjustments if the pipelines agree to that method. If the pipelines refuse, then the producers must make the refunds by lump-sum cash payment. A producer, therefore, cannot offset the Order 93 Btu refunds with production-related charges unless the pipeline (or other first sale purchaser) agrees to this method or the Commission grants the seller the right to such an offset in the final rule.

AGD urges the Commission not to grant such a right. If the Commission modified the Interim Rule to grant producers the right to offset Btu refunds with production-related claims (or any other claims in dispute), the Commission would intrude upon, and possibly upset, the parties' negotiating positions regarding the amounts which are properly owed for production-related claims (or any other claims in dispute). Moreover, offsetting Btu refunds with amounts claimed for production related activities would considerably complicate the Commission's and the States' monitoring of the Btu refund process.

AGD has even greater concern with Tennessee's proposal that pipelines be permitted to offset Order 93 refunds to their customers with production-related claims accumulated by Tennessee. AGD urges the Commission not to mix Order 93 refunds and production-related claims for the same sound policy reasons enunciated in the Interim Rule (mimeo at pp. 18-19) in favor of requiring cash payment of refunds by pipelines to their customers

instead of a reduction in purchased gas costs for the future. In fact, each of the reasons cited by the Commission for requiring lump-sum cash refunds applies with equal force to the question of whether Btu refunds should be offset by amounts claimed for production-related activities. Those reasons will be discussed in order below.

An Offset of Btu Overcharges Will Penalize Those Entitled to Refunds

The first reason cited by the Commission for favoring cash refunds by pipelines to their customers is that the refunds should be made so far as possible to those who actually paid the Btu overcharges. A refund of these overcharges through the PGA mechanism would not return the dollars to those who paid them because of seasonal disparities in purchasing patterns but even more important because of substantial changes in purchasing patterns by pipeline customers through two or three future PGA periods relative to the purchasing patterns during the periods when the Btu overcharges were paid.

For several reasons, an offset of Btu refunds with production-related charges would result in a mismatch of those entitled to Btu refunds and those who may be responsible for a share of production-related charges. First, the periods during which Btu surcharges and production-related charges apply are substantially different. Order 93 permitted Btu's to be measured on a "dry" basis for all volumes sold from December 1, 1978, to January 19, 1984. By comparison, Order 94-A permits the retroactive collection of delivery and compression allowances from July 25, 1980 to the present. Thus, Btu surcharges apply to gas volumes purchased for a period of approximately twenty months before producers were entitled to claim any production-related allowances for delivery and compression activities. Moreover, Btu measurement on a "dry" basis has been prohibited since January 19, 1984; therefore, surcharges on volumes purchased since then

would not have been collected by the pipelines. In fact, some pipelines may have ceased collecting Btu surcharges shortly after the Court's decision vacating the "dry" Btu rule on August 9, 1983. In short, the periods during which volumes of gas purchased from pipelines were subject to Order 93 surcharges and production-related charges are substantially different, and any attempt to match the two would be artificial and unfair to those who paid Btu measurement overcharges.[2]

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[2] Tennessee argues that a mismatch would not occur in its case. At the May 24 public hearing, Tennessee argued that the percentage of its total sales volumes taken by those customers who paid most of the Btu overcharges did not change appreciably during the period January 1982 through January 1984. Tennessee, therefore, concludes that it would be fair to offset production-related claims applicable to that period against Order 93 refunds.

Tennessee's argument is deficient in several respects. First, a customer's percentage of Tennessee's total sales may have remained relatively stable from 1982 to 1984 while its takes from Tennessee in absolute terms may have varied considerably because of substantial swings in Tennessee's total sales during that period. Tennessee's argument is further deficient because it offers no projection of what each customer's purchases may be, either in absolute terms or as a percentage of Tennessee's total sales, during the next two or three PGA periods when Tennessee would flow through the accumulated production-related charges. In fact, a certificate application filed by Tennessee on May 24, 1984 (Docket No. CP84-441), the same day on which it presented its offset proposal at the public hearing, Tennessee proposed several major shifts in the contract demands of its customers. For example, Tennessee proposes a reduction of about 232,000 dt per day in the maximum daily quantities to be sold to Columbia Gas Transmission Corporation; an increase in the contract demand of Public Service Electric & Gas Company from 35,700 Mcf per day to 88,000 dt per day—an increase of over 100 percent; and an increase in the contract demand of Granite State Gas Company from 84,000 Mcf per day to 127,000 dt per day—a growth of approximately 50 percent. Tennessee, therefore, has failed to establish that an offset of Btu refunds with accumulated production-related claims over the next two or three PGA periods would be fair to those customers who paid the Btu overcharges.

An Offset of Btu Refunds Would Disrupt Current Market Forces

Offsetting Btu refunds with production-related charges would also distort competition among pipelines. One of the reasons cited by the Commission for requiring cash refunds by pipelines to their customers rather than a PGA flow-through is that cash refunds will be least disruptive of current natural gas market forces. Interim Rule, mimeo, at 18-19. As certain commenters pointed out in their response to the Commission's Notice of Inquiry, permitting a pipeline with substantial Btu refund responsibility to flow through those refunds by reductions in its PGA could give that pipeline an artificial competitive advantage over pipelines with substantially less Btu refund responsibility.[3]

An offset of Btu refunds with accumulated production-related charges via the PGA flow-through mechinism [sic] would have the same disruptive effect on competitive market forces that the Commission recognizes in the Interim Rule and in its Notice of Inquiry on PGA revisions. If pipelines were permitted to offset Btu refunds with production-related claims, a pipeline like Tennessee with substantial Btu refund responsibility and even greater accumulated production-related claims, could take advantage of the offset privilege to escape difficult negotiat-

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[3] The Commission sounded a similar note in its April 27, 1984 Notice of Inquiry in Docket No. RM84-12-000, "Revisions to PGA Regulations", where the Commission stated:

> For example, the [PGA] flow-through of large refunds from a period substantially longer than six months may result in an unfair competitive advantage for the pipeline. The proposed PGA adjustment will reflect the refund, but not accrued increases in gas costs. Thus, the refunding pipeline's commodity rate could temporarily undercut a competing pipeline's rate, despite the fact that the refunding pipeline's underlying costs of gas is higher than its competitor's.

Notice of Inquiry, mimeo, at 11-12. The Commission further observed that "a lump-sum cash refund avoids distortion of market signals and unfairness to the pipeline's competitors." *Id.* at 13.

ing decisions with its producer-suppliers and marketing decisions with respect to what its markets could tolerate in PGA pass-throughs. An offset privilege would permit Tennessee to use the Btu refunds owed to it by its producer-suppliers as a fund for the settlement of possibly all of its accumulated production-related claims with the result that Tennessee could gain a substantial competitive advantage unrelated to its efforts to reduce purchased gas costs.

An offset of Btu refunds with accumulated production-related claims would not only disrupt competitive market forces at the pipeline marketing level, it could also disrupt the bargaining positions of producers and pipelines regarding the allowability of production-related charges claimed by the producers. The record in this proceeding indicates that many pipelines, including Tennessee, have paid little or none of the production-related charges invoiced by the producers. Tennessee stated that it has been invoiced approximately $125 million in production-related charges, which it has been reviewing (Tr. 86), and that its potential liabilty for retroactive surcharges could approach $200 to 250 million (Tr. 46, 92). During the May 24 hearing, the producers stated that the pipelines have generally not been paying amounts billed by the producers for production-related activities (Tr. 117-19, 125-26). The evidence indicates, therefore, that pipelines have accumulated large amounts of retroactive production-related surcharges, although the Commission in Order 94-A directed producers and pipelines to spread the collection of retroactive gathering and compression allowances as evenly as possible over 1983 and 1984.[4]

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[4] Despite this accumulation of unpaid production-related charges, there is no indication that the producers have taken legal action to recover these amounts from their pipeline customers, as they have in certain other cases, when pipelines have refused to take or pay for gas at levels provided in contracts with their producer suppliers. There is evidence in other proceedings that the pipelines have disputed the producers' contractual authority to collect

Whatever the reasons for the accumulation of unpaid production-related claims, the matter appears to be complicated, and the Commission ought not to upset the relative bargaining positions of the parties by permitting an offset of production-related claims against Btu refunds due. The Commission certainly has no obligation to do so. Contrary to the statement of the Indicated Producers at the hearing, the Commission's duty with respect to collection of production-related allowances is clearly not the same as its duty with respect to refunds of Btu overcharges. In the series of orders implementing Section 110 of the NGPA, the Commission simply identified those production-related activities for which producers could recover costs incurred, provided that they have express contractual authority to do so. The Commission has no obligation to *assure* the producers' recovery of such costs; rather it has a duty to assure that any recovery of such costs in addition to the applicable ceiling price meets the requirements of Section 110 of the NGPA. By comparison, the Commission's duty to enforce the ceiling price provisions of the NGPA is clear in Section 504 of that Act. The Commission, therefore, has an obligation to see to it that Btu refunds are made; it has no corresponding obligation to assure the producers' recovery of production-related charges where such amounts are in dispute.

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production-related allowances, even delivery allowances for which the Commission found an area rate clause to be sufficient contractual authority in Order 94-A. See, *e.g.*, Request of Crystal Oil Company for an Interpretation of the General Counsel, filed June 13, 1983; Petition for Reconsideration and Clarification of Michigan Wisconsin Pipe Line Company, filed in Docket Nos. RM80-47-002, *et al.* on June 23, 1983. In addition, the Joint Docketing Statement of Pipeline Petitioners in the Consolidated Petitions for Review of Order No. 94-A *et seq.* includes the following issue: "Whether the Commission erred in determining that an area rate clause in a gas purchase contract constitutes contractual authority to collect delivery allowances regardless of the actual intent of the contracting parties."

Two other reasons cited in the Interim Rule in favor of cash refunds apply with equal force to the question of offsetting Btu refunds with production-related charges. The Commission noted that cash refunds to pipeline customers would give greater flexibility to State agencies to assure that consumers who paid the overcharges receive the refunds. The Commission further noted that cash refunds would facilitate monitoring of the refunds at both the federal and state levels. State public service commissions are anticipating substantial refunds from Btu overcharges; the Interim Rule schedule calls for refunds to reach distribution companies between November 1 and December 1, just in time for the State agencies to direct a cash refund or a reduction in winter rates for consumers. An offset of Btu refunds with production-related charges would upset those expectations, confuse the issues and unnecessarily complicate the monitoring of the Btu refund process.

In summary, pipelines should not be permitted to offset Btu refunds with accumulated production related charges. All of the reasons cited in the Interim Rule for requiring cash refunds to pipeline customers rather than PGA flow-through also favor segregating Btu refunds and production-related claims. Mixing the two will inevitably upset the sound refund policy adopted by the Commission in the Interim Rule.

Secondary Pipelines Should Not Be Exempted From the Cash Refund Rule

At the May 24 public hearing, Columbia Gas Transmission Corporation (Columbia) proposed that secondary pipelines be exempt from the cash refund requirement and be permitted to flow refunds received from other pipelines through their PGA's. Columbia cited the administrative burden of processing checks to its customers following receipt of refunds from its pipeline suppliers. Columbia's burden appears no greater than other pipe-

lines, many of whom have multiple pipeline suppliers. Moreover, Columbia fails to show that the administrative burden of processing refunds from pipeline suppliers will be substantially greater than processing refunds from producer-suppliers; yet Columbia asks no exemption from the cash refund requirement for producer-supplier refunds. Columbia's proposal should be denied.

The Commission Lacks the Power to Order Flow-Through at the State Level

At the May 24 public hearing, the Industrial Groups urged the Commission to amend the Interim Rule to require flow-through of Btu refunds at the State level to industrial users. The Industrial Groups argued that Sections 501 and 504 of the NGPA give the Commission the authority to order such a flow-through without conflict with the jurisdiction of State public service commissions. Neither section grants the Commission the power to override State governmental authorities in matters relating to the disposition of refunds.[5] Moreover, where Congress intended to grant the Commission the power to review State agency determinations, as it did in Section 503 of the NGPA, or to pre-empt State and local law, as it did in Section 205(d) of the NGPA regarding passthrough of incremental pricing surcharges to distribution company customers, the intent of Congress was clear and unequivocal. Neither Section 501 nor 504 of the NGPA grants the Commission sovereign power over the disposition of refunds at the State and local level. The proposal of the Industrial Groups, therefore, should be denied.

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[5] The Industrial Groups cite a sentence in the NGPA Conference Report discussion of Section 504. The report states that the Commission's authority pursuant to this Section includes the authority to require refunds from any person. This power, of course, in no way implies that the Commission also has authority to override State governmental authorities in the disposition of refunds at the State or local level.

Reports Should Not Be Required From Local Distribution Companies

In the Interim Rule, the Commission declined to require refund reports from local distribution companies because producer sales to such entities comprise a small portion of the total sales subject to Btu overcharges. The Commission nevertheless requested comment on whether it should require reports from all first-sale purchasers including local distribution companies, Hinshaw pipelines and end-users. AGD concurs in the reason cited by the Commission for declining to require reports from such entities and further suggests that the burden of producing such reports would far outweigh any benefit which might result from producing them. In addition, local distribution companies will likely be required to file reports with State authorities. It would be particularly burdensome for these entities to be subject to producing two different reports for federal and state authorities.

Conclusion

For the reasons stated above, AGD urges the Commission to adopt its Interim Rule without modification as the Final Rule in this matter.

Respectfully submitted,

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Dated: June 21, 1984

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 81-1690, *et al.*

INTERSTATE NATURAL GAS
ASSOCIATION OF AMERICA, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

MOTION OF PETITIONER ASSOCIATED GAS DISTRIBUTORS FOR ORDER DIRECTING COMPLIANCE WITH MANDATE

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Rule 6 of this Court, Petitioner Associated Gas Distributors (AGD)* moves this Court for an order directing Respondent Federal Energy Regulatory Commission (FERC) to comply with this Court's mandate. In support of this motion, AGD states as follows:

1. On August 9, 1983, this Court issued its decision vacating FERC's "dry Btu rule", as then embodied in 18 C.F.R. Section 270.204, on the grounds that such rule was "fundamentally at odds with the Btu measurement technique implicit in the NGPA" (Natural Gas Policy Act of 1978). 716 F.2d at 15.

2. On December 8, 1983, this Court issued its mandate in these proceedings and denied FERC's motion for

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* The companies known as Associated Gas Distributors are listed in Appendix A.

a continuation of the stay of the issuance of the mandate. In a memorandum accompanying its December 8, 1983 order, this Court found that FERC had not established good cause for an extension of the stay.

3. On December 14, 1983, AGD filed motions in several pipeline proceedings at FERC, requesting the Commission to issue orders directing the pipelines to make immediate rate reductions to eliminate future overcharges resulting from erroneous Btu measurement techniques and to refund past overcharges in order to implement this Court's judgment and mandate. In these motions, AGD cited the irreparable harm which had resulted from past overcharges and the compounding of that injury if those overcharges were not immediately terminated and refunds ordered.

4. On January 13, 1984, FERC responded to AGD's motions for immediate relief in conformity with this Court's mandate. The Commission issued a notice stating that it intends to act on the Court's decision "*including the refund consequences of the Court's decision*, generically, and hereby gives notice of its intention to act on AGD's motions at that time". (Emphasis added.) A copy of this notice is attached as Appendix B.

5. On January 19, 1984, FERC issued its Order No. 356 in Docket No. RM80-33-001. This order revised the Commission's regulations in response to this Court's mandate by providing that the Btu content of natural gas must be measured on a "wet" basis rather than a "dry" basis (as provided in regulations vacated by this Court), effective as of December 1, 1978 (the effective date of NGPA).

6. Also on January 19, 1984, FERC issued a Notice of Inquiry ("NOI") in Docket No. RM84-6-000, entitled "Refunds Resulting From Btu Measurement Adjustments". In this NOI, FERC requested public comment on procedures it might adopt to govern *refunds for over-*

charges during the period December 1, 1978 to January 19, 1984. A copy of this NOI is attached as Appendix C.

7. On May 3, 1984, FERC issued an Interim Rule requiring refunds of Btu overcharges by natural gas producing companies. According to this Interim Rule, "first sellers" of natural gas (gas producers) were required to refund their Btu overcharges with interest on November 5, 1984 (the date set for "large producers") or May 3, 1985 (the date set for "small producers"). Interstate pipelines were required promptly to pass on these refunds in lump sum payments to those customers actually overcharged as a result of the Commission's vacated "dry Btu" orders.

8. On September 20, 1984, FERC issued its Order No. 399 adopting as a "Final Rule" the May 3 Interim Rule with certain clarifications and modifications. This order, which denied rehearing of the Interim Rule, *specifically prohibited offsets* of the Btu measurement overcharges (Btu refunds) and production-related costs permitted under Section 110 of NGPA. As in the case of the Interim Rule, this Final Rule required "large" first sellers to pay refunds on November 5, 1984; "small" first sellers were required to pay their refunds by May 3, 1985. A copy of Order No. 399 is attached as Appendix D.

9. On October 24, 1984, FERC issued its "Order Granting Stay and Rehearing for the Purpose of Further Consideration" in Docket No. RM84-6-003, thereby postponing the effectiveness of Order No. 399 "until the tenth day following issuance of our order disposing of the petitions for rehearing". The Commission explained in this order that it wanted to consider all petitions for rehearing of Order No. 399 and that a "limited stay" of Order No. 399 was necessary for that purpose.

10. On November 20, 1984, FERC issued its Order No. 399-A in Docket No. RM84-5-003. In this order "granting in part and denying in part rehearing" of Or-

der No. 399, the Commission (by a vote of 3-to-2) adopted a substantial and dramatic modification of its September 20 "Final Rule" requiring "large producer" refunds of Btu overcharges by November 5, 1984. Specifically, Order No. 399-A announces two major changes in the refund procedures previously adopted: *First*, the deadline for large producers' refund payments was extended to December 31, 1984. *Second*, in lieu of a cash payment of refunds by large producers, the Commission provided that "to the extent that a pipeline-purchaser and first seller agree on an amount of Section 110 allowances owed by the pipeline to the first seller, such amount *shall be offset against the amount of the Btu refund due to the pipeline*". (Emphasis added.) A copy of Order No. 399-A is attached as Appendix E.

ARGUMENT

11. AGD respectfully requests the Court to issue an order directing the Commission to comply promptly with this Court's mandate by reinstating the terms of FERC Order No. 399. *Such an order is required because Order No. 399-A effectively frustrates this Court's mandate in this case.*

12. The mandate issued in this case requires two things: (a) an immediate rate reduction by all first sellers to reflect the adoption of the "wet" Btu standard of measurement (this part of the mandate has been implemented pursuant to FERC Order No. 356, issued January 19, 1984), and (b) the refund of all first seller's overcharges resulting from Btu measurements made pursuant of [sic] the now-vacated "dry Btu" rule. (This part of the mandate would have been implemented by November 5, 1984 under the terms of Order No. 399; under Order No. 399-A, the refund portions of the mandate may never be implemented.

13. FERC's Order No. 399-A effectively defeats the orderly and prompt refund process adopted in Order No.

399 and made necessary by this Court's mandate in this case. Order No. 399 required gas producers/first sellers to make cash refunds of Btu-measurement-overcharges by either November 5, 1984 or by May 3, 1985. Pipelines receiving these cash refunds were required by Order No. 399 promptly to pass on these payments to their customers in lump sum payments to those customers actually overcharged.

14. Order No. 399-A explicitly provides that pipelines and producers "may choose the method of payment" of refunds for Btu-measurement-overcharges. *See* Order No. 399-A, Ordering Paragraph D (p. 45). That order provides that "to the extent that a pipeline-purchaser and first seller agree on an amount of Section 110 allowances owed by the pipeline to the first seller, such amount shall be offset against the amount of the Btu refund due to the pipeline". *The effect of Order No. 399-A is to place in the hands of the gas pipelines and the gas producers the determination of the amount of refunds the gas consumer will receive as a result of being the victim of FERC's now-vacated rule on Btu measurement.* This extraordinary, unprecedented refund procedure represents an abdication by FERC of the duty it had to implement this Court's mandate. Two private parties, neither of which has any interest in whether the gas consumer ever receives one cent of refunds, have been allowed to bargain with each other (until December 31, 1984) over the amount of cash refunds that will be paid to the consumer as a result of this Court's August 9, 1983 ruling.

15. The Court will observe that the enforcement of its mandate herein is not being requested by all the parties which were "successful" in this proceeding. Apart from Laclede Gas Company, a local gas distribution company, the other Petitioners in this case were either interstate gas pipelines or, in the case of I.N.G.A.A., a trade association representing gas pipelines. The fact that none of

these pipeline petitioners has chosen to bring FERC Order No. 399-A to the Court's attention as a departure from or frustration of the Court's mandate in this proceeding is understandable. At least some of the larger interstate pipelines have urged FERC to adopt a refund order permitting them to bargain with their producer-suppliers concerning the latters' refund obligations resulting from this Court's ruling. *See* the Commission's references to the positions of Tennessee Gas Pipeline Company, Consolidated Gas Transmission Corporation, Panhandle Eastern Pipe Line Company and Trunkline Gas Company (pp. 23 and 34, Order No. 399-A). Order No. 399-A makes plain the fact that the "offset" approach to the determination of refunds was advocated by both the pipelines *and the producers*, but opposed by AGD.

WHEREFORE, for the reasons stated above, AGD respectfully requests the Court to grant the relief requested herein, i.e. to enforce its mandate in this proceeding by issuing an order requiring FERC to comply with its mandate in this case by reinstating FERC Order No. 399 or otherwise prohibiting pipelines and producers from jointly determining the producers' obligations to make the cash refunds necessary to redress the irreparable injury sustained by the nation's gas consumers as a result of FERC's invalid "dry Btu" order.

Respectfully submitted,

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Dated: November 21, 1984
Washington, D.C.

APPENDIX D

ASSOCIATED GAS DISTRIBUTORS

Atlanta Gas Light Company

Subsidiaries:

Georgia Gas Company
Georgia Engine Sales & Service Co.
Trustees Investments, Inc.

Baltimore Gas & Electric Company

Subsidiaries:

Safe Harbor Water Power Corporation
Diversified Holdings, Inc.

Subsidiaries:

Baltimore Biogas, Inc.
Baltimore Capital Resources, Inc.
Resource & Property Management, Inc.

Bay State Gas Company

Subsidiaries:

Bay State Energy Resources, Inc.
Bay State Exploration, Inc.
Bay State Gas Supply, Inc.
Northern Utilities, Inc.

Subsidiary:

Granite State Gas Transmission, Inc.

The Berkshire Gas Company

Boston Gas Company

Parent: Eastern Gas and Fuel Associates

The Brooklyn Union Gas Company

Subsidiaries:

Fuel Resources, Inc.
Gas Energy, Inc.

Star Enterprises, Inc.
Methane Development Corp.

Affiliate: Honeoye Storage Corp.

Central Hudson Gas & Electric Corporation

Subsidiaries:

Central Hudson Enterprises Corp.
Central Hudson Cogeneration, Inc.
CH Resources, Inc.
Greene Point Development Corp.
Phoenix Development Co., Inc.

Chesapeake Utilities Corporation

Subsidiary:

Eastern Shore Natural Gas Co.
Subsidiaries:

Dover Exploration Co.
Skipjack, Inc.
Sharpgas, Inc.

City of Holyoke, Mass., Gas & Electric Department

City of Norwich, Dept. of Public Utilities

City of Westfield Gas & Electric Light Department

Colonial Gas Company

Subsidiaries:

Transgas, Inc. (Mass.)
Massachusetts Associates, Inc. (Mass.)

Commonwealth Gas Co.

Parent: Commonwealth Energy System

Concord Natural Gas Corporation

Subsiidary: Concord Gas Service Corp.

Consolidated Edison Company of New York, Inc.

Delmarva Power & Light Company

Subsidiaries:

Delmarva Energy Company
Delmarva Industries, Inc.
Delmarva Capital Investments, Inc.

Subsidiary: DCII, Inc.

Elizabethtown Gas Company

Parent: NUI Corporation

EnergyNorth, Inc.

Subsidiaries:

Gas Service, Inc.

Subsidiary: Energy Resources Corp.

Manchester Gas Co.

Subsidiaries:

Rent-A-Space of New England, Inc.
EnergyNorth Realty, Inc.

Essex County Gas Company

Fitchburg Gas & Electric Light Company

Subsidiary: Fitchburg Energy Development Co.

Lynchburg Gas Company

Subsidiary: Lynco Development Corp.

New Jersey Natural Gas Company

Parent: New Jersey Resources Corporation

New York State Electric & Gas Corporation

Subsidiary: Somerset Railroad Corporation

North Carolina Natural Gas Corporation

Subsidiaries:

NCNG Exploration Corp.
Cape Fear Energy Corp.

Northeast Georgia Municipal Gas Utilities

City of Bowman, Ga.
City of Buford, Ga.
City of Commerce, Ga.
City of Covington, Ga.
City of Elberton, Ga.
City of Hartwell, Ga.
City of Lawrenceville, Ga.
City of Madison, Ga.
City of Monroe, Ga.
City of Royston, Ga.
City of Social Circle, Ga.
City of Sugar Hill, Ga.
City of Toccoa, Ga.
City of Union Point, Ga.
City of Winder, Ga.

Subsidiaries:

The Connecticut Light & Power Co.
Western Massachusetts Electric Co.
Holyoke Water Power Company
Northeast Utilities Service Co.
Northeast Nuclear Energy Co.

Northern Utilities, Inc.

See Bay State Gas Company

Pennsylvania Gas & Water Company

Parent: Pennsylvania Enterprises, Inc.

Pequot Gas Co.

Philadelphia Electric Company

Subsidiaries:

Adwin Equipment Company
Adwin Realty Company
Conowingo Power Company
Eastern Pennsylvania Development Company
Eastern Pennsylvania Exploration Company

Philadelphia Electric Power Company
The Susquehanna Electric Company
The Susquehanna Power Company

Philadelphia Gas Works

Providence Gas Company
Parent: Providence Energy Corporation

Public Service Company of North Carolina, Inc.
Subsidiary:

PSNC Natural Resources Corporation

Subsidiaries:

Tar Heel Energy Corp.
PSNC Production Corp.
PSNC Exploration Corp.
PSNC Propane Corp.

Public Service Electric & Gas Co.

Subsidiaries:

Energy Development Corporation

Subsidiary:

Gasdel Pipeline System, Inc.

Energy Pipeline Corporation
Energy Terminal Services Corporation
Mulberry Street Urban Renewal Corporation
PSE&G Overseas Finance N.V.
PSE&G Research Corporation

South County Gas Co.

South Jersey Gas Co.

Parent: South Jersey Industries, Inc.

The Southern Connecticut Gas Co.

Parent: Connecticut Energy Corp.

UGI Corporation

Subsidiaries:

AmeriGas, Inc.
UGI Development Co.

Valley Gas Co.

Parent: Valley Resources, Inc.

Washington Gas Light Co.

Subsidiaries:

Crab Run Gas Co.
Davenport Insulation, Incorporated

Subsidiaries:

Cellin Manufacturing, Inc.
Universal Insulation, Inc.
Featherstone Manufacturing Co., Inc.

Frederick Gas Co., Inc.
Hampshire Gas Co.
Shenandoah Gas Co.
Brandywood Estates, Inc.

Subsidiary:

Washington Gas Approved Services, Inc.

Rock Creek Properties, Inc.